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No. 338

Supreme Court of the United States

WELWEL WARSZOWER, alias "Robert William Wiener," etc.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSMOND K. FRAENKEL,
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Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

WELWEL WARSZOWER, also known as William Wiener, respectfully prays:

That a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York convicting petitioner of a violation of United States Code Title 22 § 220.

Summary Statement

Petitioner was indicted for the use of a passport obtained as the result of statements alleged to be false (R. 5).

Petitioner contends that the government failed to prove any use of the passport; that the use charged—a showing to an immigration inspector upon arrival in New York—was not a use in violation of the statute; that the government failed to establish the falsity of at least two of the statements alleged to have been false, thus requiring reversal since petitioner separately moved to exclude each of these statements from the jury (R. 198-205, 207) and the trial judge charged that conviction could result if any of the statements was false (R. 217).

Petitioner's contention that the showing of a passport to an immigration inspector upon arrival is not the kind of use contemplated by the statute rests on the same considerations as were advanced by the defense in *United States* v. *Browder,* 112 F. 2nd , and the Circuit Court in the case at bar rested entirely on that decision in this regard.

Petitioner's contention that there was no proof of the use of the passport requires an analysis of the evidence. As to this the Circuit Court of Appeals said that the conflict was for the jury to resolve.

The only evidence of the use of the passport was that of Inspector Faire. He testified that he examined incoming passengers on the S. S. Normandie on September 30, 1937 (R. 53). He had no recollection of appellant (R. 53). He was shown a portion of the ship's manifest (Exhibit 6, p. 243), which, it was assumed, had been prepared by the purser (R. 50, 56), but which had been signed by the witness (R. 53). The purser did not testify. This manifest listed the names of various persons who were admitted as American citizens (R. 48). It shows numbers opposite their names (R. 47). Opposite the name of appellant was the number 332207 (R. 243). This was the number of the

passport issued on the application (Exhibit 1, p. 238, R. 27).

Faire testified on direct examination that appellant had presented his passport because its number appeared on the list (R. 53). On cross-examination, however, he said that it was not necessary for an incoming passenger to show a passport to establish his citizenship and thus his right to enter (R. 56). A birth certificate, or any other satisfactory means of identification, would suffice (R. 56 *cf.* 103). And Faire expressly said that he would not indicate on the manifest the nature of the identification produced (R. 56). When questioned by the Court as to the significance of the check mark, Faire said that it did not necessarily indicate that a passport had been shown. We shall, in the accompanying brief, go more fully into this testimony.

Petitioner's contention that matters were improperly submitted to the jury presents important and substantial questions of law. Petitioner asserted that, as to two of the alleged false statements, the only evidence offered by the government consisted of admissions made by him and that no conviction can rest upon uncorroborated admissions—especially where the crime charged is not an act but a statement. In other words, the government tried to prove that appellant had made a false statement at the time of application for the passport merely by showing that on an earlier occasion he had made a different statement.

This phase of the case arose from the charge that petitioner had falsely stated that he was a citizen of the United States (R. 4) and that he had not resided outside the United States (R. 5). The government showed that petitioner had stated that he was a citizen of Russia on arrival in 1914 (Ex. 19, p. 261), in his 1918 draft record (Ex. 21, p. 264)

and in a reentry application of 1932 (Ex. 13, p. 252). It showed also that he had been out of the United States from April 19th to June 5, 1932 (R. 244, 245)—but this could not be considered a "residence" abroad—and that, on his arrival in 1914, he had stated that he was born in Russia (Ex. 19, R. 261).

The Circuit Court of Appeals ruled that these admissions corroborated each other and were also corroborated by the proof that petitioner, in obtaining his passport, had relied on a forged birth record purporting to show birth in Atlantic City. But that Court also held that the rule as to admissions had no application where the admissions relied on were made before the crime charged, rather than thereafter.

Jurisdiction

This Court has jurisdiction under Judicial Code § 240 Subdivision "A". The application is timely since the decision of the Circuit Court of Appeals was rendered on July 9, 1940. No petition for rehearing was made.

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported. It appears at pages 296-301 of the record.

Questions Presented

1. One issue here presented is the question involved in *Browder* v. *United States,* in which an application for certiorari is now pending, namely the interpretation of United States Code Title 22 § 220, never heretofore considered, whether the presentation of a passport to an immigration

officer upon landing in New York is a use within the meaning of that statute.

2. Another issue is whether a conviction for use of a passport can be upheld when the only witness of such alleged use had no independent recollection of the presentation of the passport and testified that the records on which he relied did not necessarily show a use of the passport.

3. The case also presents the question whether a conviction can be had on evidence of uncorroborated admissions made before the crime charged, especially where the crime charged was a false statement and each alleged admission was merely a different statement from the corresponding later one.

4. Finally, the case presents the question of the extent of the evidence required to corroborate admissions.

Reasons Relied Upon for the Allowance of the Writ

1. There is here presented for decision an important question of federal law which has not been, but should be, settled by this Court. Whether the word "use" in Title 22 § 220 must be literally construed so as to apply to every possible display of a passport or should be restricted to uses of a passport *qua* passport—*i.e.* in connection with travel *from,* rather than *to,* the United States—is an important and undetermined question.

2. The second question urged by petitioner raises an important question with regard to the sufficiency of evidence on which the guidance of this Court will be of benefit to all inferior federal courts.

3. The Circuit Court of Appeals for the Second Circuit has decided an important question of federal law in a way which conflicts with decisions of other Circuits, notably those of the Ninth Circuit in *Duncan* v. *United States,* 68 F. 2nd 136 and *Gordnier* v. *United States,* 261 Fed. 910. In these cases the well established rule was followed, that a conviction may not rest on admissions alone. In the case at bar, for the first time, a qualification has been written into that rule that it applies only to admissions made *after* the commission of the crime. No such limitation has heretofore been stated in any decided case—and it is contrary to the holding in the two cases cited, as expressly conceded by the Circuit Court of Appeals here.

4. The Circuit Court of Appeals for the Second Circuit has decided an important question of federal law in a way which conflicts with decisions of other Circuits, notably that of the Court of Appeals for the District of Columbia in *Forte* v. *United States,* 94 F. 2nd 236. In that case the well established rule was followed that evidence relied on as corroborative of admissions must reach every essential element of the crime. In the case at bar it was held that corroborative evidence was sufficient if it but "fortified" the admission. The Circuit Court in the case at bar expressly stated its refusal to follow the *Forte* case. Moreover, the decision of the Circuit Court of Appeals on this aspect of the case is directly in conflict also with the decision in the *Duncan* case, ***supra.***

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it is further prayed that the order of the said Circuit Court of Appeals for the Second Circuit affirming the judgment of conviction of the District Court for the Southern District of New York be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

August 7, 1940.

WELWEL WARSZOWER,
Petitioner.

By

OSMOND K. FRAENKEL,
EDWARD I. ARONOW,
Counsel for Petitioner.

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Supreme Court of the United States

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BRIEF FOR PETITIONER

The facts and issues have been stated in the foreoing petition. They will be elaborated in the discussion which follows to the extent thought helpful.

POINT I.

The interpretation of Title 22 §220 presents an important question which should be settled by this Court.

Petitioner was indicted for violation of Title 22 § 220 in that he "used" a passport alleged to have been fraudulently obtained by showing it to an immigration officer at the port of New York in order to qualify as an American citizen (R. 5). By motion duly made at the appropriate stages of the trial (R. 196-198, 207), adverse rulings on which were excepted to (R. 198, 207) and assigned as

error (Ass. 4, 11, 19, 23, R. 283-7), petitioner challenged the interpretation of the statute on which the indictment rested. He contended that since no passport was required by statute for reentry into the United States and passports are issued only to facilitate travel abroad, the employment of the passport for the purposes indicated here was not a "use" within the intent of the statute. In essence the argument is that only use *qua* passport was contemplated by Congress; that the "use" here was no more such use *qua* passport than if the document had been shown to a bank teller to identify the person described.

In this respect the case at bar is identical with the *Browder* case and the Circuit Court of Appeals disposed of this phase of the case merely by reference to its opinion in that case handed down a few weeks earlier. Since the arguments underlying petitioner's contention have been fully elaborated in the petition and brief submitted to this Court in that case nothing would be gained by repetition here.

POINT II.

The issue raised by the challenge of the sufficiency of the evidence of use warrants review by this Court.

We recognize that ordinarily this Court will not review a decision of a Circuit Court on the sufficiency of the evidence—at least where no constitutional issue is involved. We believe, however, that the circumstances in this case are sufficiently unusual to justify a departure from that practice.

Here the government relied on but a single witness, the immigration inspector Faire. He expressly said that he had no independent recollection of the arrival of petitioner (R. 53). Therefore his testimony concerning the presentation of a passport by petitioner on his arrival—the vital fact to be proved—depended on his reconstruction of the event from his general practice, being aided by certain documents. In effect the evidence was therefore entirely circumstantial. It is petitioner's contention that a fair and impartial scrutiny of all the testimony necessitates the conclusion that the testimony did not exclude the hypothesis of innocence. It left open the hypothesis that petitioner presented some document other than a passport as identification. Consequently proof of guilt beyond a reasonable doubt was lacking and petitioner's motions for a directed verdict on this express ground (R. 186-196, 207) should have been granted. Exceptions to these rulings (R. 196, 207) were appropriately preserved (Ass. 5-10, 24, R. 284, 288).

The law on the subject is clear and uniformly adopted. Some recent applications may be found in *Nosowitz* v. *United States,* 282 Fed. 575; *Romano* v. *United States,* 9 F. 2nd 522; *United States* v. *McNaugh,* 42 F. 2nd 835; *Stone* v. *United States,* 47 F. 2nd 202; *United States* v. *Park Ave. Pharmacy,* 56 F. 2nd 753; *United States* v. *Ruffino,* 67 F. 2nd 440; *United States* v. *Buchalter,* 88 F. 2nd 625; *United States* v. *Silva,* 109 F. 2nd 531. See also *Rivera* v. *United States,* 57 F. 2nd 816 (1st Circuit), *Neal* v. *United States,* 102 Fed. 2nd 643 (8th Circuit) and *Boatright* v. *United States,* 105 F. 2nd 737 (7th Circuit).

That this case falls within the rule follows from a close analysis of the testimony. Mr. Faire testified that the

presence of Mr. Wiener's name on Government's Exhibit 6, the manifest of the S. S. Normandie (R. 243) indicated that he was admitted to the United States as an American citizen (R. 53). The manifest indicated also that he was born on September 5, 1896 in Atlantic City, New Jersey (R. 53). There were check marks against the names of all the persons on that list (R. 53). Mr. Faire testified that he made the check marks (R. 58).

After stating that he had examined a great number of persons on incoming passenger ships, Mr. Faire said that he had no independent recollection of the arrival of defendant (R. 53). He said:

> "Q. Do you have any independent recollection of the arrival of this particular individual, Robert Wiener? A. No, I don't."

He was then asked the following questions:

> "Q. Can you state from looking at the manifest, Mr. Faire, whether or not the passport of the individual Robert Wiener was presented to you? A. Yes, sir, I can.
>
> "Q. On what do you base your statement? A. The number of the passport, No. 332207, is entered on the manifest and it is my invariable practice when the number of the passport appears on the manifest to ask for that passport and have it shown to me" (R. 53).

On cross-examination Mr. Faire said that an American citizen did not need a passport in order to enter, that he could use anything which would satisfy the inspector as to his identity as an American citizen (R. 56). He might present a birth certificate (R. 56, *cf.* 103). Then Mr. Faire said:

"Q. Any proof that would satisfy you of his American birth would pass him into the country as an American citizen? A. That is right.

"Q. It wouldn't have to be a passport? A. No.

"Q. Did you make any writing on the list of names as to what the people showed you yourself? A. No, I did not" (R. 56).

On re-direct examination the witness gave an affirmative answer to the direct question whether or not defendant had presented his passport in the particular case, but on further cross-examination he explained that he based this answer only on the fact that there was a passport number on the manifest (R. 57).

There then followed a colloquy between the Court and the witness which is reproduced in full:

"The Court: * * * Do you mark on that manifest when a man identifies himself,—do you make any entry on the manifest when a man identifies himself as an American citizen?

"The Witness: The whole manifest is of American citizens.

"The Court: And when the man presented his passport what did you do?

"The Witness: That check mark shows he was admitted as a United States citizen.

"The Court: On a passport?

"The Witness: Not necessarily.

"The Court: Can you tell us whether he had a passport?

"The Witness: From the fact the number of the passport appears there.

"Q. And you checked——

"Mr. Fowler: That is objected to.

"Q. Did you check the information on the manifest with information in the passport? A. That is correct" (R. 58).

The substance of the testimony, therefore, is that the witness, having no recollection of the incident, concludes that a passport was shown in the particular instance only because there was a number on the list and he had made a check against the name. The witness, however, admitted that means of identification other than a passport might have been produced, that in such a case there would also be a check against the name without any specific notation of the nature of the other means of identification. Finally, when pressed by the Court, the witness said that the check mark indicated only that the person was admitted as a United States citizen and not necessarily that he was admitted on a passport.

In considering this point the Circuit Court stressed the witnesses' repeated statements "that the entry of the passport number on the manifest enabled him to say with assurance that he had been shown the passport" (R. 299). The difficulty with the Court's paraphrase of the testimony is that it leaves out significant portions of it. It is our contention that the testimony must be considered as a whole and that so considered it lacks the degree of proof essential in a criminal case. This becomes evident when the entire manifest in evidence is examined (R. 243). The page there shown consists entirely of American citizens (R. 58). In each instance there was a passport number; in each instance a check. The significant fact is that the witness Faire had not put any number on the list (R. 56, 57), but only the check (R. 58). The purpose of the check was to show that the person named was admitted as an American citizen (R. 58). Citizenship is determined by the document presented as identification—and the witness testified that it did not have to be a passport (R. 56). Therefore

if every person on that list had shown a passport the witness necessarily must have answered in the affirmative the question put by the Court that the check mark indicated that the person had been admitted on a passport. Yet this the witness was unwilling to do. His answer was "not necessarily" (R. 58). In other words, there was a possibility that one or more of the persons on the list had not shown a passport, despite the fact that each name was accompanied by a passport number. And since the witness had no recollection of petitioner (R. 53) it might have been petitioner who had shown something else to identify himself. And no testimony about "invariable practice" (R. 53) can overcome that "not necessarily."

The case is similar to *People* v. *Weiseman,* 280 N. Y. 385. In that case the Court of Appeals of the State of New York by Chief Judge Crane reversed a conviction and dismissed the indictment because no proper inference of guilt could be drawn. The charge there was escaping from custody while a prisoner. The evidence of the People indicated that defendant might have slipped out while a policeman took out other prisoners. However, the People's testimony also established that each of the persons who went out with this policeman was specifically accounted for. The Court pointed out that the inference which might have been permissible from the first part of the testimony was contradicted by the second part of the testimony and that under such circumstances defendant's guilt had not been proved beyond a reasonable doubt. Chief Judge Crane said at page 389:

> "The People's case is made up on the inference that Weiseman must have slipped out when Devine took out his nine prisoners. This might have been a fair inference if it were not for the fact that these same People's witnesses contradict it."

So in the case at bar the first part of Faire's testimony is contradicted by the second part of it. No proper inference of guilt is, therefore, permissible.

POINT III.

The refusal of the Circuit Court of Appeals for the Second Circuit to follow decisions in other Circuits on the necessity for corroboration of admissions requires review by this Court.

The Circuit Court in the case at bar expressly refused to follow the Ninth Circuit's decisions in *Gordnier* v. *United States,* 261 F. 910 and *Duncan* v. *United States,* 68 F. 2nd 136 (R. 300).

The question arose because of petitioner's contention that issues had been submitted to the jury without any evidence to sustain the government's contention other than admissions by petitioner. The government charged that petitioner had made four false statements (R. 4, 5): that his name was Wiener; that he was an American citizen; that he was born in Atlantic City, New Jersey, on a specified date; that he had never resided outside the United States. At the trial petitioner moved separately to exclude from the jury's consideration each of these four statements (R. 198-205, 207). Exceptions were noted to the Court's refusal (R. 199-207) and error duly assigned (Ass. 12-16, R. 285, 286). Since the Trial Court twice charged the jury that it could convict if it found any one of the statements false (R. 217, 224) there can be no doubt that error was committed if the jury was improperly permitted to consider any one of these four statements.

In support of that proposition of law petitioner, in the Circuit Court, relied on *Nash* v. *United States,* 229 U. S. 373; *Stromberg* v. *California,* 283 U. S. 359; *Patterson* v. *United States,* 222 Fed. 599; *Loomis* v. *United States,* 61 F. 2nd 653. The government did not take issue with this contention and the Circuit Court assumed the rule to be applicable—petitioner having taken the necessary appropriate steps at the trial. *Cf. United States* v. *Rebhuhn,* 109 F. 2nd 512, 515; *United States* v. *Mascuch,* 111 F. 2nd 602

We come, therefore, to the basic problem. Was there sufficient evidence to go to the jury as to each one of the four statements alleged to have been false? Petitioner contends that as to two of them there was not, since the only evidence consisted of his own declarations. The government to prove non-citizenship relied solely on statements made by defendant reproduced in the manifest of S. S. Haverford of 1914 (Ex. 19, p. 261) in the draft record of 1918 (Ex. 21, p. 264) and in the reentry application of 1932 (Ex. 13, p. 252)—statements which indicated birth in Russia. Thus the government sought to establish that the 1936 passport statement of American birth was false not by proof that the fact was otherwise, not even by a declaration of petitioner's that his 1936 statement was false, but merely by showing that petitioner had previously made different statements. Petitioner is shown to have made two inconsistent statements, but there is no proof as to which is false.

So, in attempted proof of residence abroad the government relied only on the same Haverford manifest (Ex. 19, R. 261). The brief absence in 1932, from April 19th to June 5th (R. 245, 244) can not be considered a "residence" (*Transatlantica Italiana* v. *Elting,* 74 F. 2nd 732; *In re Carnera,* 6 F. Supp. 267).

To be sure the government argues that there was independent corroboration of its claims and the Circuit Court appears to have accepted that argument (R. 300, 301), in so doing again conflicting with other courts—as we shall show hereafter. But since its main reliance was on the applicable rule of law we believe a square issue has been presented for disposition by this Court.

In the Circuit Court petitioner contended that the general rule precluding conviction on admissions alone applied to this case, citing, among others, the two cases above referred to which the Circuit Court refused to follow. The government did not challenge the rule contended for, claiming only that there had been corroboration. This claim rested in part on the matters adverted to by the Circuit Court, to be discussed hereafter, in part on the contention that proof of the use of the passport was corroboration of one element of the crime and thus sufficient. This contention on the part of the government was not mentioned by the Circuit Court.

Instead the Circuit Court laid down a new rule of law, namely, that a conviction could rest on the unsupported declaration of a defendant made before the commission of the crime. In justification of that doctrine the Circuit Court argued that the rule contended for by petitioner had arisen as protection against an untrue confession, "coerced or psychopathic". Therefore, said the Court, the policy of the rule did not apply to declarations made before the commission of the offense.

The distinction thus made is an interesting one. There is no doubt that a higher probative value should be given to declarations made without motive to falsify and, to some extent, the law has taken cognizance of this criterion. Various exceptions to the hearsay rule, such as the law of

dying declarations, evidently rest on such psychological considerations. But in the field of criminal law the requirement of independent proof of the *corpus delicti* goes beyond the narrow grounds of confessions obtained by coercion or because of the accused's psychopathic disposition. It is entwined with the presumption of innocence (*Clayton* v. *United States,* 284 F. 537). It rests on the evident fact that people often tell untruths and that convictions resting upon uncorroborated statements more often are unjust than otherwise. That, in a particular case, the declarations may have inherent plausibility should not affect the general rule.* Nor is there reason to expect that convictions will thus be rendered impossible, for generally a diligent prosecutor can obtain corroboration of the facts.

Let us suppose a prosecution for bigamy in which the fact of the first marriage is established only by a declaration made by the defendant before the second marriage. In the absence of some proof that a marriage had actually been consummated the defendant's statement should not be sufficient, for all such a statement amounts to is a belief that he had been married or a desire that others should so believe. So in the case at bar the earlier statements by petitioner amount to nothing more than his belief that he had been born in Russia. Surely he cannot be sent to jail because at a later time he had a different belief and expressed it.

In a number of cases statements made before the commission of the crime have been held insufficient in the ab-

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*Indeed no relaxation of the ordinary rule with regard to confessions is permitted merely because the circumstances indicate that the confession was a genuine one—that merely affects the admissibility, not the sufficiency of the confession.

sence of corroboration of the *corpus delicti: People* v. *Lambert,* 5 Mich. 349 (bigamy); *People* v. *Isham,* 109 Mich. 72 (adultery); *Hiler* v. *People,* 156 Ill. 511 (bigamy); *Green* v. *State,* 21 Fla. 403 (bigamy); *People* v. *Simonsen,* 107 Cal. 345 (false pretenses).

The true nature of the problem was considered by the Circuit Court of Appeals for the Ninth Circuit in the *Duncan* case, *supra.* In that case defendant was convicted on three counts: for false statements in obtaining a passport, which included a statement of birth at a particular time and place; for falsely representing himself as a United States citizen; for perjury in making the statements in the passport. The Circuit Court upheld the conviction on the first and third counts because there was independent evidence that defendant had not been born at the time and place indicated—evidence stronger indeed than similar evidence in the case at bar (see R. 130, 133) because it was shown in the *Duncan* case that defendant had a part in the falsification of the birth record. But the Court reversed the conviction on the second count because there was no independent evidence of foreign birth. There, as here, the government relied entirely on declarations made by the defendant before the commission of the crime—on the manifest of the original entry, and on applications for life insurance, for a marriage license and for naturalization.

In the *Gordnier* case the same Court reversed a conviction for failure to register under the draft. The only proof that defendant was of the required age consisted of declarations concerning his age which defendant had made on earlier occasions. Such declarations, being but expressions by defendant of his own belief, could not form the basis of conviction of crime. Before sending a man to jail

the government should establish that the earlier statement attributed to defendant really represents the facts.

That these decisions in the Ninth Circuit are in direct conflict with the decision below is evident and was recognized by the Circuit Court of Appeals herein (R. 300).

Support for the view that an accused may not be convicted merely on his uncorroborated admissions alone, whether the admissions were made before or after the event, is found in the law of perjury.

The analogy from the law of perjury is peculiarly apt in this case as the essence of that crime is false swearing, which is precisely the charge made against the defendant herein. A study of the perjury cases discloses that it is insufficient to convict an accused of perjury merely by showing that he made two or more contradictory statements.

The general rule in the United States in perjury cases is stated by Wharton, as follows:

> "When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false." (Wharton's Criminal Law (12th Ed.) Vo. 2, Sec. 1583.)

In all the perjury cases applying this rule, not one makes the distinction made by the Circuit Court in the instant case, between contradictory statements or admissions made before the event and those made after the event. On the contrary, there have been many reversals of conviction made upon contradictory statements or admissions alone, although they were made prior to the alleged criminal act.

Thus, in *People* v. *McClintic,* 193 Mich. 589, 160 N. W. 461, where the defendant testified twice under oath, con-

tradicting himself the second time, the Court reversed a conviction of perjury based on the later testimony, saying (160 N. W. at p. 464):

> "We think that it should be held that a conviction for perjury cannot be sustained merely upon contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement."

In *State* v. *Carter,* 315 Mo. 215, 285 S. W. 971, a conviction of perjury was likewise reversed, where the sole proof of falsity was demonstrated by prior inconsistent statements of the accused. The Court said (28 S. W. at p. 971):

> "* * * It was not sufficient to prove only that appellant made statements concerning such acts and admissions contradictory to his testimony when sworn and examined as a witness in respect thereto."

In *Clayton* v. *United States,* 284 F. 537, the defendant made certain statements to the police and thereafter contradicted those statements when testifying before the Grand Jury. The Court reversed the conviction, saying (at p. 539):

> "In prosecutions for perjury it has long been settled that not only must the guilt of the accused be established beyond reasonable doubt, as in other criminal cases, but that the falsity of the matter sworn to by him must be proved by direct and positive evidence."

In *Paytes* v. *State,* 137 Tenn. 129, 191 S. W. 975, the defendant was convicted of perjury for testifying at a trial contrary to his prior testimony before the Grand Jury. The conviction was reversed, the Court stating the rule as follows (191 S. W. at p. 975):

> "But by a decided weight of authority the Courts of this Country declare the rule that in order to sustain a conviction for perjury it is not sufficient to prove merely that the accused at different times made, or testified to, two statements that cannot be reconciled; and that there must be some additional testimony as to the falsity of the matter in respect of which perjury is averred."

Other cases in accord are:

> *People* v. *Chadwick,* 4 Cal. App. 63;
> *Richardson* v. *State,* 45 Ohio, App. 46, 186 N. E. 510;
> *Billingsley* v. *State,* 49 Texas Cr. 620, 95 S. W. 520.

It is obvious, therefore, that the Circuit Court, in the instant case, errs when, although accepting the general rule requiring the corroboration of extrajudicial admissions, it limits the scope of the rule to admissions made after the event. No other court in the United States has ever made that distinction.

The weakness of that distinction may be further shown if we assume, for the moment, that the defendant had made the alleged false statements concerning his citizenship and residence while testifying in court instead of in a passport application. Under the rule laid down unanimously by the cases above cited, he could not be convicted of perjury

merely by proving that he had made prior inconsistent statements. Independent evidence of the falsity or corpus delicti of the later statements would be necessary.

Yet, in the instant case, the Court departed from the universally recognized rule and held that independent proof was unnecessary. Surely, this departure cannot be justified because the defendant was not charged with perjury in a court of law. The essence of the defendant's alleged crime and the essence of the crime of perjury is false swearing, and the rule governing one is equally applicable to the other.

To sustain the conviction of the defendant on contradictory statements made by him, without requiring independent evidence of the corpus delicti, is to depart from our long established traditions of Anglo-American law, which require, in every case, that there be proof that a crime was actually committed, outside of the extrajudicial statements of the defendant alone.

We believe the decision in the case at bar is in conflict with the sound rule, is indeed the first expression of a rule never even suggested before. We have been unable to find any other cases, state or federal, which throw light on the problem. Review by this Court is, therefore, essential lest the uncertainty created by the decision below result in confusion.

POINT IV.

The decision of the Circuit Court as to what constitutes corroboration requires review by this Court.

As we have already pointed out, petitioner contends that certain issues had been improperly submitted to the jury because the evidence consisted only of admissions. The

Circuit Court overruled this contention in part by holding that there had been corroboration (R. 300). In so doing it stated that it preferred the rule it had laid down many years ago in *Daeche* v. *United States*, 250 F. 566, to the rule recently laid down by the Court of Appeals for the District of Columbia in *Forte* v. *United States*, 94 F. 2nd 236. In that case the Court pointed out that the corroboration had to be of every essential element of the crime other than the identity of the wrongdoer. In the case at bar evidence was accepted as corroborative which merely "fortified" the truth of the admissions. The difference between the two rules is fundamental and requires resolution by this Court.

Moreover, there is conflict between the decision in the case at bar and that in the *Duncan* case *supra*. For in both cases the evidence was of similar character. In both the manifest at the time of first entry indicated foreign birth and nationality; in both defendant presented a certificate of native birth and the evidence showed that the record behind the certificate had been forged; in both defendant had repeatedly declared that he was an alien. These items were declared corroboration in the case at bar; they were rejected as corroboration in the *Duncan* case. To be sure there was in the case at bar some very vague proof that petitioner had not applied for naturalization (R. 82, 83); on the other hand in the *Duncan* case, but not in this, defendant was proved to have been a party to the forgery of the native birth record—and in that case there actually was proof of foreign birth.

The difficulty with the argument of the Circuit Court in the case at bar arises from a failure separately to consider the various elements of the crime charged against him. Thus in discussing corroboration the Court linked

together the declarations "of name, alienage, foreign birth and residence abroad." Of course, there was corroboration of petitioner's use of two names and he has never contended otherwise. And petitioner did not, in the Circuit Court, complain of the submission to the jury of the issue of his place of birth. But on the two relevant issues, alienage and residence abroad, we submit there was no corroboration.

The Circuit Court referred in the general discussion to three items of proof: the 1914 manifest; the forged Atlantic City record; the testimony about naturalization. The second and third of these could have no possible bearing on the issue of residence abroad and the first is not independent corroboration at all, since the manifest was, for all that appears, based only on the declarations of petitioner. Indeed counsel for the government so conceded at the trial (R. 202). Evidence of this kind was expressly held not corroboration in the *Duncan* case, and properly so. Thus it appears that there was no corroboration whatever of petitioner's declarations with respect to at least one of the issues submitted to the jury.

And with respect to the other, the question of alienage, the supposed corroboration is wholly insufficient. The manifest, we submit, may not be considered, being but an admission at second hand. The forged Atlantic City record is, under the *Duncan* case, insufficient, and on good logic. It but excludes one possible native birth and in no way even indicates foreign birth, much less foreign citizenship. Nor does the vague proof that petitioner had not applied for naturalization corroborate his declarations of foreign birth, since a failure to apply for naturalization is consistent, rather than inconsistent with the later claim of native birth.

While, in the *Duncan* case, this proof was lacking, and its absence commented on, in that case there was proof of foreign birth; therefore proof that there had been no naturalization might establish non-citizenship. But here the evidence outside the declarations adds nothing; it does not even "fortify."

CONCLUSION

It is respectfully submitted that review should be had by this Court to clarify the meaning of Title 22, § 220, to reconcile differences between the Court below and other federal appellate courts and to establish the proper rule governing the effect of declarations made by an accused and the extent to which they must be corroborated.

Respectfully submitted,

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United States Code, Title 22, Section 220:

> *"False Statement in application: use of passport obtained by false statement: penalty.* Whoever shall wilfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall wilfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both. (June 15, 1917, c. 30, Title IX, Section 2, 40 Stat. 227.)"

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